

The Texas Commission on Environmental Quality (commission) proposes amendments to §§35.801, 35.802, 35.804, 35.805, 35.807, and 35.808.

The amended sections will be submitted to the United States Environmental Protection Agency as a revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

House Bill (HB) 2949, 79th Legislature, 2005, amended Texas Water Code (TWC), §5.515, to allow for authorization of emergency orders to repair or replace roads, bridges, or other infrastructure improvements involving public works projects destroyed during a catastrophe. The TWC previously only authorized emergency orders to allow repair of a facility or control equipment. Amended TWC, §5.515 adds language regarding the contents of the application for an emergency order. The required language in the application pertaining to the reason for allowing the construction and emissions was expanded to include preventing a “loss of a critical transportation thoroughfare.” The purpose of this rulemaking is to reflect these changes in Subchapter K of this chapter. Because the statute is self-implementing, an emergency order could currently be issued for one of the previously described instances prior to the adoption of these proposed rules.

The proposed rules would add language authorizing emergency orders to include repair or replacement of roads, bridges, or other infrastructure improvements to the list of actions that can be authorized by an emergency order. Additionally, the proposed rules would authorize an applicant to list loss of a critical transportation thoroughfare as a reason why the construction and emissions are essential. As a

point of clarification, it is noted that the issuance of an emergency order, under the proposed rules, to a rock crusher or concrete batch plant that performs wet batching, dry batching, or central mixing will not be prohibited under TWC, §5.5145, or subject to penalty under TWC, §7.052(b), because the facility is considered to be operating under a temporary permit as provided in TWC, §5.501(a)(2)(A).

SECTION BY SECTION DISCUSSION

The commission proposes administrative changes throughout the rules to conform with Texas Register requirements and agency guidelines.

The proposed amendment to §35.801, Emergency Orders Because of Catastrophe, adds roads, bridges, or other infrastructure to the list of repairs or replacements for which the commission may authorize immediate action. The commission also proposes to revise the definition of catastrophe by replacing the word “operator” with the word “applicant” and by adding the language “or a road, bridge, or other infrastructure.”

The proposed amendment to §35.802, Application of an Emergency Order, adds language, in paragraphs (1) and (5), allowing an applicant to state that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure to the list of possible statements in an application for an emergency order of why the construction and emissions are necessary. In describing the limitations on the proposed construction and emissions, the applicant may cite the public works project as the specific basis for the emergency authorization.

The proposed amendment to §35.804, Issuance of Order, adds language, in paragraph (1), allowing the commission to issue an order under this subchapter if it is found that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure to the list of possible reasons that would allow the commission to issue an emergency order. Proposed new §35.804(5)(C), adds public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The proposed amendment to §35.805, Contents of an Emergency Order, adds in paragraph (3), public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The proposed amendment to §35.807, Affirmation of an Emergency Order, adds language, in paragraph (1), allowing the commission to affirm a proposed or issued order under this subchapter if the applicant shows that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure to the list of possible reasons that would allow the commission to issue an emergency order. Proposed new §35.807(5)(C) adds public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The proposed amendment to §35.808, Modification of an Emergency Order, adds language, in paragraph (1), allowing the commission to modify a proposed or issued order under this subchapter if the applicant shows that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or any other unit of state or local government.

The proposed rules allow for the authorization of emergency orders to repair or replace roads, bridges, or other infrastructure improvements involving public works projects destroyed during a catastrophe. The rulemaking is consistent with HB 2949. The TWC previously only authorized emergency orders to allow the repair of a facility or control equipment. The proposed rules would add language authorizing emergency orders for the repair or replacement of roads, bridges, or other infrastructure improvements. Additionally, the proposed rules would authorize an applicant to list loss of a critical thoroughfare as a reason why the proposed construction and emissions are essential.

In general, the proposed rules are expected to affect rock crushers and concrete batch plants in that the proposed emergency order could authorize any air emissions or other activities necessary to repair or replace infrastructure in the event of a catastrophic event. No costs are anticipated for the agency to

implement the proposed rules, and no fiscal implications are anticipated for other units of state or local government due to the enforcement or administration of the proposed rules.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law, and the expedited rebuilding or repair of critical infrastructure in the event of a catastrophe.

The proposed rules would authorize emergency orders that previously would not have been allowed under commission rules. Allowing another category of emergency orders would permit industry to respond more quickly to catastrophes that affect major infrastructure. The emergency order could authorize any air emissions or other activities from rock crushers and concrete batch plants to repair or replace any necessary infrastructure. Because the amended statute is self-implementing, an emergency order could currently be issued prior to the adoption of these proposed rules. No fiscal implications are anticipated for businesses or industry due to the implementation of the proposed rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that own or operate rock crushers or concrete batch plants. The proposed rules would authorize emergency orders that previously would not have been allowed under commission rules and are expected to permit industry to respond more quickly to catastrophes that affect major infrastructure.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from exposure and that may adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission has determined that the proposed rulemaking does not fall under the definition of a "major environmental rule" because none of the proposed rules mandate new requirements for the regulated community. Rather, the proposed rules are intended to reflect the statutory changes made to TWC, §5.515, by HB 2949.

Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a

state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law under TWC, Chapter 5, Subchapter L; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather specifically under TWC, §5.515.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of the rules is to incorporate into commission rules the changes made to TWC, §5.515, by the Texas Legislature by adding language to authorize emergency orders in the event of a catastrophe to include the repair or replacement of roads, bridges, or other infrastructure.

Promulgation and enforcement of the proposed amendments would constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rulemaking because the proposed amendments neither relate to, nor have any impact on, the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking. None of the proposed rules mandate any new requirements, but rather, provide for a specific type of authorization.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The CMP goal applicable to the proposed rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the administrative policies and the policies for specific activities related to the emission of air pollutants. Promulgation and enforcement of these proposed rules is consistent with the applicable CMP goals and policies because the proposed rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders for the repair or replacement of roads, bridges, or other infrastructure when necessitated by a catastrophe, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances such as potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on April 4, 2006, at 10:00 a.m. in Building B, Room 201A, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, a staff member will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lola Brown, Office of Legal Services at (512) 239-0348. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Texas Register Team, Office of Legal Services, MC 205, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. All comments should reference Rule Project Number 2005-070-035-LS. Comments must be received by 5:00 p.m., April 10, 2006. For further information, please contact Les Trobman, Environmental Law Division, (512) 239-6056.

SUBCHAPTER K: AIR ORDERS

§§35.801, 35.802, 35.804, 35.805, 35.807, 35.808

STATUTORY AUTHORITY

These amendments are proposed under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules to carry out its duties under the TWC and the other laws of the state; §5.105, which establishes the commission's authority to set policy by rule; and §5.515, which allows the commission to issue emergency orders for immediate action for the addition, replacement, or repair of facilities or control equipment, or the repair or replacement of roads, bridges, or other infrastructure, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act (TCAA).

The proposed amendments implement changes made by the Texas Legislature to TWC, §5.515.

§35.801. Emergency Orders Because of Catastrophe.

The commission or executive director may issue emergency orders under Texas Water Code, §5.515, to authorize immediate action for the addition, replacement, or repair of facilities or control equipment, or the repair or replacement of roads, bridges, or other infrastructure, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act [TCAA]. For purposes of this section, a

catastrophe is an unforeseen event including, but not limited to, an act of God, an act of war, severe weather conditions, explosions, fire, or other similar occurrences beyond the reasonable control of the applicant [operator], which renders a facility or its functionally related appurtenances, or a road, bridge, or other infrastructure, inoperable.

§35.802. Application for an Emergency Order.

The owner or operator of a facility, as that term is defined in Texas Health and Safety Code, §382.003, desiring to obtain an order under this subchapter shall submit an application in accordance with §35.24 of this title (relating to Application for Emergency or Temporary Order). The application must contain the information required by that section and the following:

(1) a statement that the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions, and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, necessitated by a catastrophe;

(2) - (4) (No change.)

(5) a statement that the proposed construction and emissions will occur only:

_____ (A) on [at] the property where the catastrophe occurred;

(B) [or] on other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided [providing] that no more than a *de minimus* [de minimis] increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe;

(6) - (10) (No change.)

§35.804. Issuance of Order.

The commission or executive director may issue an order under this subchapter if it is found that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, that is necessitated by a catastrophe;

(2) - (4) (No change.)

(5) the proposed construction or emissions will occur only:

(A) on [at] property where the catastrophe occurred; [or]

(B) on [at] other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided that [so long as there will be] no more than a *de minimus* [de minimis] increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe;

(6) - (7) (No change.)

§35.805. Contents of an Emergency Order.

In addition to the requirements of §35.26 of this title (relating to Contents of Emergency or Temporary Order), an emergency order issued under this subchapter shall contain at least the following:

(1) - (2) (No change.)

(3) authorization for action only:

(A) on [at] the property where the catastrophe occurred;

(B) [or] on other property owned by the owner or operator of the damaged facility, which [also] produces the same intermediates, products, or by-products, provided that [there will be] no more than a *de minimus* [de minimis] increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe;

(4) (No change.)

(5) a schedule for submission of a complete construction permit application under provisions of Texas Clean Air Act [TCAA], Chapter 382 [§382.0518].

§35.807. Affirmation of an Emergency Order.

The commission shall affirm a proposed or issued order if the applicant shows at the hearing, by a preponderance of the evidence, that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, that is necessitated by a catastrophe;

(2) - (4) (No change.)

(5) the proposed construction or emissions will occur only:

(A) on [at] property where the catastrophe occurred; [or]

(B) on [at] other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided that [so long as there will be] no more than a de minimus [de minimis] increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during the catastrophe;

(6) - (7) (No change.)

§35.808. Modification of an Emergency Order.

The commission shall modify a proposed or issued order if the hearing record shows that:

(1) construction and emissions otherwise precluded under the Texas Clean Air Act [TCAA] are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, that is necessitated by a catastrophe;

(2) - (3) (No change.)